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Chapter 20: Civil Procedure and Practice

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PART III

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CHAPTER 20

Civil Procedure and Practice

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§20.1. Collateral estoppel: General. *Eisel v. Columbia Packing Co.*,[1] recently decided by Judge Wyzanski in the United States District Court for the District of Massachusetts, involved a question of collateral estoppel. The theory of collateral estoppel is an outgrowth of the doctrine of res judicata.[2] Whereas res judicata, however, aims at the

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§20.1. [1] 181 F. Supp. 298 (D. Mass. 1960).

[2] "The doctrine of res judicata is a rule of public policy founded on the established principle that it is in the interest of the parties and for the public welfare that litigation once decided on its merits should end. . . . This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of public peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." Browne v. Moran, 300 Mass. 107, 111, 14 N.E.2d 119, 121 (1938).

"A judgment on the merits in an earlier proceeding between the same parties is a bar, as to every issue that in fact was or in law might have been litigated, to a later proceeding on the same cause of action." Cleaveland v. Malden Savings Bank, 291 Mass. 295, 298, 197 N.E. 14, 16 (1935).

"Where res judicata is pleaded the burden of proof of establishing it is upon the party who relies upon it." Cochrane v. Cochrane, 303 Mass. 467, 472, 22 N.E.2d 6, 9 (1939).

"The fact essential to establish the defence of res judicata was the existence of a judgment in a former action conclusive upon the parties to the present action. Whether the judgment is conclusive depends, however, on the proceedings in the action in which it was obtained as shown by the record thereof . . . which cannot

prevention of relitigation of the same cause of action by the same parties after a final judgment has been rendered on the merits, collateral estoppel attempts to restrict the relitigation of identical issues.[3] Thus, if a particular issue has been determined by a trier of fact in a court of competent jurisdiction, the doctrine of collateral estoppel may prevent a redetermination of this issue in a subsequent proceeding. Traditionally, however, the doctrine was available only as a defense, and then only if the party using it was a party to the first action, or in privity with such a party.[4] The language of two leading Massachusetts cases illustrates these requirements:

> A verdict and judgment are conclusive by way of estoppel only as to those facts which were necessarily involved in them, without the existence and proof or admission of which such a verdict and judgment could not have been rendered. An estoppel is an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies.[5]

Again the Court has stated: ". . . there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties." [6]

§20.2. **Collateral estoppel: Privity.** Although the question of privity has often been crucial in determining whether the doctrine of

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be contradicted or varied . . . but which may be explained by extrinsic evidence in an appropriate case." Gallo v. Foley, 299 Mass. 1, 5, 11 N.E.2d 803, 806 (1937).

"The general rule in this Commonwealth is that a judgment following the sustaining of a demurrer is not a bar to a second action for the same cause of action. . . . There is, however, a well established exception to this general rule, and a judgment in the earlier action following the sustaining of a demurrer is a bar to a second action for the same cause of action where the plaintiff had been granted leave to amend his earlier declaration and had neglected or refused to do so." Hacker v. Beck, 325 Mass. 594, 597, 91 N.E.2d 832, 834 (1950).

[3] "When a fact has once been determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which from motives of public policy the law does not permit to be done." Giedrewicz v. Donovan, 277 Mass. 563, 565-566, 179 N.E. 246 (1931).

Extensive review of the subject may be found in Developments in the Law — Res Judicata, 65 Harv. L. Rev. 818 (1952); Note, Direct Action Statutes, 74 id. 357, 367-374 (1960). Some of the problems involved in the use of the doctrine in criminal cases are discussed in Note, Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel, 74 id. 752, 757-764 (1961).

[4] "The principle of res judicata cannot apply unless the previous action was between the same parties or their privies, touched a subject matter involved in both actions, and was decided against the party attempting to litigate the same subject matter again." Hopkins v. Holcombe, 308 Mass. 54, 57, 30 N.E.2d 824, 826 (1941).

[5] Giedrewicz v. Donovan, 277 Mass. 563, 565, 179 N.E. 246 (1931).

[6] Old Dominion Copper Mining and Smelting Co. v. Bigelow, 203 Mass. 159, 217, 89 N.E. 193, 218 (1909).

collateral estoppel will apply, there is no definition of privity that immediately determines in all situations whether parties are privies.[1] One frequently cited definition states:

> One comprehensive definition of privies is such persons as are "privies in estate — as donor and donee, lessor and lessee and joint tenants; or privies in blood — as heir and ancestor; or privies in representation — as executor and testator or administrator and intestate; or privies in law — where the law without privity in blood or estate casts land upon another, as by escheat." [2]

It is certain, however, that "[p]rivity depends upon the relation of the parties to the subject matter, rather than their activity in a suit relating to it after the event." [3] There is no privity between joint wrongdoers or partners.[4]

§20.3. Collateral estoppel: Relaxation of privity requirement. In relatively recent years there has been a trend of the courts to expand the doctrine of collateral estoppel beyond the confines imposed upon it by the requirement of privity. The language used in a leading New York case clearly illustrates this trend:

> In cases involving the relationship of principal and agent, master and servant, or indemnitor and indemnitee, the liability of more than one party turns on, or is dependent upon, identical issues. In such situations when the complaining party has been given a full opportunity to litigate those issues against one of the parties, and has been defeated on grounds other than a personal defense, he is not permitted to relitigate the same issue in a new action against the other. The unilateral character of estoppel in such cases is warranted by the policy of the doctrine of res judicata — that there be an end to litigation.[1]

Thus, the strict requirement of mutuality or privity of parties is diminishing in a growing number of jurisdictions. This is especially true when the doctrine is used defensively. Massachusetts appears to be slowly joining this trend. As early as 1931, the Supreme Judicial Court decided that, as a matter of public policy, if it is clearly established in

§20.2. [1] "But there is no generally prevailing definition of privity which can be automatically applied in all cases. Who are privies requires careful examination into the circumstances of each case as it arises." Old Dominion Copper Mining and Smelting Co. v. Bigelow, 203 Mass. 159, 214, 89 N.E. 193, 217 (1909).

[2] 203 Mass. at 218, 89 N.E. at 218-219.

[3] 203 Mass. at 216, 89 N.E. at 216.

[4] "No judgment can be regarded as res judicata as to any matter where the rights in the subject matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard. . . . There is no privity between joint wrongdoers, because all are jointly and severally liable." 203 Mass. at 217, 89 N.E. at 218.

§20.3. [1] Israel v. Wood Dolson Co., 1 N.Y.2d 116, 119, 134 N.E.2d 97, 99 (1956).

a trial against either an employer or employee for damages caused by the employee's negligent conduct, that the employee is not negligent, the judgment in the case first tried is a bar to a subsequent action by the same plaintiff, for the same negligent act of the same employee.[2] The concept of mutuality did not enter into this decision. The Court did, however, quote the language in a leading South Carolina case in point: ". . . the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." [3]

In a 1946 case, the Supreme Judicial Court continued its departure from the mutuality requirement by stating:

> The principle is well established that, where a plaintiff seeks damages against a master for injuries alleged to be due to the negligence of his servant and fails to prove such negligence and then brings an action against the servant for the same injuries, the servant may assert the defense of res judicata on the ground that it has already been adjudicated in the earlier action that he was not negligent.[4]

In this case, as in the *Giedrewicz* case, the exception to the requirement of mutuality is centered around a situation involving vicarious liability in which the defendants are master and servant or principal and agent. But these decisions still leave open the question of how far the Massachusetts Court will go in expanding the application of the doctrine of collateral estoppel.

§20.4. Collateral estoppel: Privity in indemnification relationship. *Eisel v. Columbia Packing Co.*,[1] a diversity case, was governed by the Massachusetts law of collateral estoppel. Judge Wyzanski ruled that when a consumer of ham brought a products liability action against a retailer in a Connecticut court and there was judgment for the retailer upon a finding that the consumer's injuries did not result from any defect in the ham, the consumer could not relitigate this issue in a subsequent action against the packer in the federal court. Thus, in granting the motion of the Massachusetts packer for summary judgment, the court permitted the use of the doctrine of collateral estoppel defensively, although there was no privity between the packer and the retailer. In reaching his decision, the judge found no Massachusetts ruling that squarely governed the case. Furthermore, the available authorities led in different directions. The classic authority on collateral estoppel, *Old Dominion Copper Mining & Smelting Co. v. Bige-*

[2] Giedrewicz v. Donovan, 277 Mass. 563, 179 N.E. 246 (1931).
[3] Jenkins v. Atlantic Coast Line R.R., 89 S.C. 408, 412, 71 S.E. 1010, 1012 (1911).
[4] Silva v. Brown, 319 Mass. 466, 469, 66 N.E.2d 349, 351 (1946).

§20.4. [1] 181 F. Supp. 298 (D. Mass. 1960).

low,[2] which was affirmed by the Supreme Court of the United States,[3] held that failure to recover against one of two joint tort-feasors is not a bar to a suit against the other upon the same facts.[4] The Federal District Court recognized that respected authorities[5] would apply the reasoning of the *Bigelow* case to the facts of the *Eisel* case, in which two persons who were alleged to have acted independently in inflicting the same injury upon the plaintiff were sued in succession, even though the first defendant would have had a right of indemnification against the second defendant. The court was of the opinion, however, that *Giedrewicz v. Donovan*[6] and *Silva v. Brown*[7] implied that Massachusetts ". . . is hospitable to the growing tendency to extend the doctrine of collateral estoppel in cases where it is sought to use a prior judgment defensively against the plaintiff." [8]

In support of the decision, the court stated:

> . . . where a plea of collateral estoppel is raised against a plaintiff who had a full trial in a prior action, the decisive question is not whether there is mutuality of estoppel. Nor is the decisive question whether there is technical privity between the second defendant and the first defendant. Instead of such wooden tests, inquiries should have been made as to whether plaintiff had a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time. And, many courts also believe it is appropriate to inquire whether the second defendant has such a factual relationship to the first defendant that it is equitable to plaintiff to give the second defendant the benefit of the first defendant's victory. . . .
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> Plaintiff foresaw that, whether he sought to hold the indemnitor or the indemnitee, he would have the burden of proving that his injury was caused by the ham. On that issue he had all the relevant evidence. He has had his day in court on the issue in a forum of his own choosing. . . .
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> While one of the strongest policies in the law is that every man shall have an opportunity to be heard, there is no persuasive public policy for allowing him a second opportunity when he seeks to raise on the second occasion an issue which arose in substantially the same context on the first occasion, when that issue was fully tried, and when, if plaintiff had succeeded on his first effort, the first defendant would have had a right of indemnification against the second defendant.[9]

2 203 Mass. 159, 89 N.E. 193, 40 L.R.A.(N.S.) 314 (1909).
3 225 U.S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009 (1912).
4 225 U.S. at 129, 32 Sup. Ct. at 643, 56 L. Ed. at 1022.
5 Restatement of Judgments §96(2); Seavey, Note, 57 Harv. L. Rev. 98, 105 (1943).
6 277 Mass. 563, 179 N.E. 246 (1931).
7 319 Mass. 466, 66 N.E.2d 349 (1949).
8 181 F. Supp. 298, 300 (D. Mass. 1960); noted in 2 B.C. Ind. & Comm. L. Rev. 164 (1960).
9 181 F. Supp. at 301.

It is probable that the Supreme Judicial Court will extend the doctrine of collateral estoppel to the point reached in the *Eisel* case when it has the opportunity to decide this issue. But it is unlikely that it will go beyond the bounds of this decision in disregarding the requirement of privity. To disregard completely the relationship of the parties and to rely solely upon whether the issues are identical would be a radical departure from the traditional concept that mutuality of estoppel is necessary for the application of the doctrine of res judicata.